

STATE OF MICHIGAN
IN THE SUPREME COURT

THERESA BEALS, as Personal
Representative of the Estate of WILLIAM
T. BEALS, Deceased,

Plaintiff-Appellee,

v

STATE OF MICHIGAN and WILLIAM J.
HARMON, Jointly and Severally,

Defendants,

WILLIAM J. HARMON, Jointly and
Severally,

Defendant-Appellant.

Supreme Court No. 149901

Court of Appeals No. 310231

Barry Cnty Circuit Crt No. 11-45-NO

REPLY BRIEF OF DEFENDANT-APPELLANT WILLIAM J. HARMON

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FILED

SEP 11 2014

LARRY S. ROYSTER
CLERK
MICHIGAN SUPREME COURT

Dated: September 11, 2014

149901
reply

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ARGUMENT

I. The Court of Appeals' decision conflicts with this Court's decision in *Dean*.

Beals agrees that government employees are not liable where the employee's action or inaction was not the one most immediate, efficient, and direct cause of the plaintiff's injury or damage. *Robinson v Detroit*, 462 Mich 439, 462; 613 NW2d 307 (2000); (Opp'n, p 10). So the entire question here is what was the one most immediate, efficient, and direct cause of Harman's drowning. And under this Court's precedent, the answer is not the lifeguard's failure to rescue, but whatever caused Harman to not resurface.

In *Dean v Childs*, 474 Mich 914; 705 NW2d 344 (2005), this Court, by adopting the reasoning of Judge Griffin's Court of Appeals dissent, held that the most direct cause of the deaths of four children in a fire was "the fire itself, not [the firefighter] defendant's alleged gross negligence in fighting it." 262 Mich App 48, 61; 684 NW2d 894 (2004) (Griffin, J, dissenting). This Court's resulting grant of summary disposition in the firefighter's favor thus ruled that his failure to rescue was *as a matter of law* not the proximate cause of their deaths. 474 Mich at 914.

This case is directly parallel to *Dean*: the most direct cause of Beals' death was the drowning itself, not the lifeguard's alleged gross negligence in failing to rescue Beals from the water. Analytically, there is no difference between a firefighter and a lifeguard—each has a duty to try to rescue someone from a hazard (fire and water). For Beals to be right, then, *Dean* must be wrongly decided.

Beals devotes only two sentences to this Court's binding decision in *Dean*. He attempts to distinguish it by observing that the plaintiffs in *Dean* conceded that "the cause of death was the fire itself, not [the] defendant's alleged gross negligence in fighting it," and then by asserting that Beals has not made that type of concession. (Opp'n, p 25.) But Beals has conceded, as he must given the evidence in this case, that "[t]he cause of Mr. Beals' death was drowning." (Opp'n, p 5; Opp'n, p 24 ("[W]e know for certain in this case that [Beals] died from drowning.").)

Unable to distinguish this Court's binding precedent, Beals instead rests his affirmative case entirely on three unpublished Court of Appeals decisions. (Opp'n, p 7, 12–20, discussing *Avery v Roberts*, 2005 WL 658922 (Mich Ct App, Mar 22, 2005), *In re Estate of Anderson*, 2012 WL 1367540 (Mich Ct App, Apr 19, 2012), and *Estate of Sherrill Turner v Nichols*, 2010 WL 4968073 (Mich Ct App, Dec 7, 2010).) But these cases cannot overcome this Court's reasoning in *Dean*.

In *Avery*, the Court of Appeals opined that the "decedent's inability to swim might be the most immediate, efficient and direct cause of *his distress*," but "a reasonable jury could conclude that the absence of the lifeguards was the most immediate, efficient and direct cause of *his drowning*." 2005 WL 658922, at *3 (emphasis added). But that reasoning is inconsistent with *Dean* (perhaps because it was decided before *Dean*). If *Avery*'s reasoning had been applied in *Dean*, this Court would have concluded that the children's susceptibility to fire was the cause of their distress, but the firefighter's negligence was the cause of their dying in the fire. Quite the opposite, this Court recognized that "the fire itself" was the one most

direct cause of their deaths. *Dean*, 474 Mich at 914; 262 Mich App at 61 (Griffin, J, dissenting). And *Anderson* and *Turner* are also contrary to *Dean*, blaming the negligent rescuer rather than the hazard (the water) that actually caused the deaths.

In the end, we simply do not know what caused Beals to sink to the bottom of the pool. Beals swam to the deep end of the pool of his own volition and tragically did not re-surface. Exactly why this happened may never be known. But the fact that we do not know what caused Beals to sink does not remove that cause from the chain of events. Again, compare this case with *Dean*: the fire itself prevented the children from escaping the fire's risk, just as here the water itself prevented Beals from escaping the water's risk.

Beals and the majority decision of the Court of Appeals state that Harman's inaction could have been the proximate cause of Beals' death because he may have been able to rescue Beals if Harman had been more attentive. But the possibility that someone could have acted prudently, instead of negligently, simply reinforces the existence of negligence; it does not mean that the person's negligence was the one most direct cause of the injury.

Harman did not cause Beals to enter the pool at the shallow end and move Beals into the deep end of the pool. Harman did not cause Beals to disappear under the surface of the water, or cause Beals to lose consciousness. Harman did nothing to create any danger or increase any risk to Beals. In other words, it was not the action or inaction of Harman that caused Beals to go under the water or not to re-

surface. Rather, Harman failed to notice Beals under the water in time to rescue him. Under these undisputed facts, Harman's conduct (i.e. his failure to act), cannot be the proximate cause of the drowning.

Much of Beals' opposition brief focuses on showing that Harman did not live up to the standards for lifeguarding—that is, to showing that he was negligent. But whether Beals was negligent or careless in his actions is not relevant to this analysis; indeed, this analysis rests on the assumption that he was negligent. What is relevant is that no alleged gross negligence on the part of Harman could have been the one most immediate, efficient, and direct cause of Beals' death. The fact remains that the most immediate, direct cause of Beals' death was his drowning in the water, and not Harman's alleged gross negligence in failing to rescue Beals from the water. At worst, Harman's arguably negligent actions might have been a proximate cause of Beals death, but they were not *the* proximate cause, as *Robinson* requires.

Simply put, in the context of governmental immunity under MCL 691.1407(2), there is no liability for failure to prevent injury not directly cause by the tortfeasor, nor is there liability for failure to rescue someone placed in jeopardy by actions of someone other than the tortfeasor. The Court of Appeals confused Harman's alleged breach of duty with causation. The majority holding of the Court of Appeals is clearly erroneous, and should be reversed.

CONCLUSION AND RELIEF REQUESTED

William Beals was an accomplished adult swimmer voluntarily participating in a recreational swim at his vocational school when he inexplicably and silently slipped under water and drowned. His fellow student, William Harman, who was working as the lifeguard, never saw Beals in distress and was therefore unable to save him. Because Harman was not the one most immediate, efficient, and direct cause of Beals' drowning death, governmental immunity bars Plaintiff's claims against Harman.

Harman respectfully requests that this Court grant the application, reverse the July 1, 2014 decision of the Court of Appeals, and remand this case to the Barry County Circuit Court for entry of judgment in Harman's favor.

Respectfully submitted,

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